IN THE

# Supreme Court of the United States

OCTOBER TERM, 1942

No. 79

WILLIAM A. ADAMS, Warden of the City Prison of Manhattan, and JAMES E. MULCAHY, United States Marshal,
*Petitioners,*

*v.*

THE UNITED STATES OF AMERICA, *ex rel.*
GENE McCANN,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITION FOR REHEARING

ROBERT G. PAGE,
*Attorney for Respondent.*

EDWARD D. WYNOT,
*Of Counsel.*

JEFFREY PRESS, INC.

IN THE

# Supreme Court of the United States

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WILLIAM A. ADAMS, Warden of the City Prison of Manhattan, and JAMES E. MULCAHY, United States Marshal,
*Petitioners,*

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THE UNITED STATES OF AMERICA, *ex rel.*
GENE McCANN,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

## PETITION FOR REHEARING.

The respondent herein prays for a rehearing and a reargument in this case, and for a stay of mandate until such rehearing and reargument have been had. The opinion of this Court was rendered and judgment entered on December 21, 1942.

The sole question involved is whether the trial judge complied with the safeguards prescribed by this Court in *Johnson v. Zerbst*, 304 U. S. 458 (1938), and *Patton v. United States*, 281 U. S. 276, 312 (1930), in sanctioning respondent's trial and conviction without the assistance of

counsel and a trial by jury. The record in this Court and in the court below presents only the Government's version of the facts relating to this question because, for the reasons which appear below, respondent did not file a traverse to the Government's return.

In order that *both* parties may be heard on the *merits* of that question, respondent will, and in this petition does, respectfully request that the opinion herein be modified and the case remanded for such further proceedings as are not inconsistent with the opinion of this Court and as the Circuit Court of Appeals for the Second Circuit may, in its discretion, deem proper to determine the question stated above. Unless this relief is granted, respondent may never be heard on the merits of the questions raised in the Government's return.

As the grounds for this petition, the respondent respectfully urges:

**1. The opinion of this Court may be taken as a final and conclusive adjudication of all questions raised in the Government's return to the writ of habeas corpus, notwithstanding the fact that the record before this Court does not show whether respondent in fact knew or was advised of, and could therefore have intelligently waived, his constitutional rights to assistance of counsel and to a trial by jury, because those questions were eliminated from the proceedings below at the suggestion of the court below.**

The opinion of this Court states:

> "We accept as facts, as did the court below, those set forth in the untraversed return to the writ of *habeas corpus* in that court. (87 L. ed. 209.)
>
> * * * * *
>
> "And if the record before us does not show an intelligent and competent waiver of the right to the

> assistance of counsel [*sic*] by a defendant who demanded again and again that the judge try him, and who in his persistence of such a choice knew what he was about, it would be difficult to conceive of a set of circumstances in which there was such a free choice by a self-determining individual.
>
> "The order of the court below must therefore be set aside.
>
> "*So Ordered.*" (87, L. ed. 215.)

Neither the opinion in this Court nor the opinion in the court below indicates that the respondent was induced to strip the record of pleadings traversing the return in order to conform to the suggestion of the court below that all controversial questions of fact should be eliminated so that, as the court later stated:

> "This point is therefore presented to us in the barest possible form: Has an accused, who is without counsel, the power at his own instance to surrender his right of trial by jury when indicted for felony?" (R. 10).

This omission, together with the portions of the opinion quoted above, may give rise to an implication that respondent did not traverse the facts stated in the substituted return for the sole reason that he was forced to concede that such facts were true, and that respondent therefore has had a full, final and conclusive adjudication of all matters raised in the return.

In fact, however, respondent upon several occasions denied the allegations of the return and, far from conceding the truth of the allegations in the Government's substituted return, appears to have considered his failure to traverse them merely as in the nature of a demurrer to the return.

It is true that this is not apparent from the record, but the fact that a writ of habeas corpus was issued (March

12, 1942; R. 1) eight days before the petition for the writ was filed (March 20, 1942; R. 2) suggests that other pleadings not revealed in the record must have preceded this petition, and no secret has been made of the fact that such pleadings existed; indeed, the original petition, dated March 12, 1942, was printed by the Government as Appendix D to its brief. Counsel for respondent and for the Government are in general agreement as to the nature and the course of such pleadings (Respondent's Brief, pp. 3-4, 33; Government's Brief, pp. 3-6, 35-36). As stated in the Government's brief (p. 35):

> "The course of the pleadings in the court below shows the purpose to eliminate all factual questions and to present this question, as the court below said, 'in the barest possible form' (R. 10)."

Respondent has filed with the Clerk of this Court an affidavit of Frank J. Walsh, his attorney in the court below (annexed hereto as Exhibit A), annexed to which as exhibits (annexed hereto as Exhibits B-D) are such of the pleadings as have not been previously printed as appendices to the briefs herein.

From this affidavit and the exhibits attached thereto, it appears that the pleadings set forth in the record were substituted for the following earlier pleadings, all of which preceded the substituted petition:

(1) Original petition, dated March 12, 1942 (Government's Brief, Appendix D).

(2) Government's original return, dated March 16, 1942 (Exhibit B hereto).

(3) Respondent's reply affidavit, dated March 18, 1942, traversing the original return (Exhibit C hereto).

Respondent's original petition and his affidavit traversing the return contained allegations to the effect that at no

time was the respondent advised by the trial judge, the United States attorney, nor by anyone else of his right to the assistance of counsel; that the trial judge did not offer to assign counsel to assist respondent; that respondent was ignorant of his right to counsel, and represented himself because he could not pay the charges of competent counsel; that in waiving a jury trial respondent acted without the advice of counsel, and without knowledge of his rights and of the significance thereof; and that the waiver was sanctioned by the trial judge as a matter of rote, without knowing the facts and without exercising any discretion.

It is clear that these allegations sufficiently traversed the facts stated in the return, and would have raised the question of whether respondent had been deprived of his constitutional rights to counsel and to a trial by jury under the decisions of this Court in *Johnson* v. *Zerbst*, 304 U. S. 458 (1938), and *Patton* v. *United States*, 281 U. S. 276, 312 (1930). That question was never presented to the court below in this form, nor decided by that court, for the reason that when the original petition, return, and traverse were handed up to the court on the return date, March 18, 1942, the court stated, according to the affidavit of respondent's counsel in the court below, that controversial questions of fact unnecessary to the decision of the case had been injected, and suggested that the pleadings be withdrawn and an amended petition filed which would present the question in the barest possible form. (Exhibit A hereto, pars. 8, 9, pp. 13-14).

In accordance with this suggestion, respondent withdrew his original petition and traverse and filed the substituted petition appearing at pages 2-3 of the record, but to this the Government filed a substituted return which was substantially identical with that filed to the original petition (cf. R. 4-7; Exhibit B hereto, pp. 16-22).

Minor discrepancies between the Government's original

and substituted returns need not be detailed, but two interesting variances may be noted. Paragraph 3 of the original return, reading as follows:

> "Upon information and belief, the petitioner was at all times aware of his constitutional rights to the advice and assistance of counsel and to a jury trial and did knowingly waive both rights with full knowledge of the significance of such acts" (Exhibit B hereto, p. 17)

was replaced by the following paragraph 3 in the substituted return:

> "Upon information and belief, the petitioner did knowingly waive his right to the advice and assistance of counsel with full knowledge of the significance of such act" (R. 42).

Paragraph 9, dealing with the "brief discussion" which allegedly took place when respondent waived a trial by jury, was identical in both returns, with the exception of the portion indicated below in italics, which was omitted from the substituted return:

> "Upon information and belief, petitioner then moved to have the case tried without a jury, by the judge alone. There was a brief discussion between the court, the petitioner, and the Assistant United States Attorney, at which it was determined that a form of waiver of petitioner's constitutional right to a jury trial should be prepared by the Assistant United States Attorney, *which would in every respect conform to the law as laid down by the Supreme Court of the United States.* Such a waiver was prepared and a copy thereof is hereto annexed and marked 'Exhibit A'. It was executed in writing by the petitioner and approved by the Assistant United States Attorney and by the court." (R. 5; Exhibit B hereto, p. 18).

Neither the court clerk's minutes, set forth in paragraph 3 of respondent's original petition (Government's Brief, Appendix D, p. 66) and in paragraph 3 of his substituted petition (R. 2), nor the minutes of the Southern District reporter, a certified transcript of which is annexed hereto as Exhibit E, report such a discussion.

It is interesting to note that both returns were executed and verified by the same persons.

In addition to the pleadings described above, which denied in detail the allegations of the first return it appears from the affidavit, Exhibit A hereto (pars. 12-16), that a pleading intended to serve as a traverse to the substituted return was prepared but was not filed by respondent's attorney in the court below, because of his belief that such action would violate the understanding upon which the original petition and traverse were withdrawn and because of his conviction that a traverse of the substituted return would merely delay decision of the case for the respondent on the bare question of law presented by the substituted petition. This pleading has been printed as Exhibit D to this petition.

**2. In any further proceedings which may be had, the opinion and mandate of this Court, unless modified as herein requested, may be held to bar a determination of whether respondent intelligently and competently waived his constitutional rights to the assistance of counsel and to a trial by jury.**

The power of an inferior court with respect to a case which has been reversed and remanded by this Court has been defined by this Court as follows:

> "When a case has been once decided by this court on appeal, and remanded to the Circuit Court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The Circuit Court is bound by the decree as the law

of the case; and must carry it into execution, according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded. * * * But the Circuit Court may consider and decide any matters left open by the mandate of this court; and its decision of such matters can be reviewed by a new appeal only. * * * The opinion delivered by this court, at the time of rendering its decree, may be consulted to ascertain what was intended by its mandate; and, either upon an application for a writ of mandamus, or upon a new appeal, it is for this court to construe its own mandate, and to act accordingly."

*In re Sanford Fork & Tool Company*, 160 U. S. 247, 255-256 (1895).

Accord:

*Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 140 (1940).

As noted above, neither this Court nor the court below have referred to the course of proceedings outlined in Point 1 hereof; this Court merely states in the portions of its opinion quoted above, at pages 2-3, that the facts set forth in the untraversed return are accepted, and that it would be difficult to conceive of a record which sets forth more clearly "* * * a set of circumstances in which there was such a free choice by a self-determining individual."

Counsel submit that, unless modified, the opinion and mandate herein may be held a bar in any further proceedings for the determination of questions indicated in Point 1 hereof, which appear to have been, but in fact never were, decided by this Court.

Cf. *Ohio Oil Company* v. *Thompson*, 120 F. (2d) 831 (C. C. A. 8, 1941), cert. denied 314 U. S. 658.

Moreover, an appeal to this Court will probably be taken from any decision in such proceedings—a result which might be avoided by clarification of the opinion at this time.

In order to provide a flexible procedure for disposition of the case below, counsel respectfully request that the case be remanded for such further proceedings, not inconsistent with the opinion, as the Circuit Court of Appeals for the Second Circuit may, in its discretion, deem proper to determine the question of whether the requirements of the *Zerbst* and *Patton* cases were observed; and that the opinion of this Court clearly indicate that this question is left open.

If this be done, it may be that the court below will deem it proper to retain jurisdiction to dispose of the case by permitting respondent to traverse the Government's return or to amend his petition pursuant to Section 760 of the Revised Statutes, which provides:

> "The petitioner or the party imprisoned or restrained may deny any of the facts set forth in the return, or may allege any other facts that may be material in the case. Said denials or allegations shall be under oath. The return and all suggestions made against it may be amended, by leave of the court, or justice, or judge, before or after the same are filed, so that thereby the material facts may be ascertained." (28 U. S. C., § 460.)

Such a procedure would be extraordinary, but, in view of all the proceedings which have been had before the court below and of the difficulty of raising the point on appeal, this would certainly appear to be the most expedi-

tious way of disposing of the question, if the court below feels that respondent has made out a point which is bound to succeed on the appeal. Cf. *Tibery* v. *Warren*, 192 Fed. 458 (C. C. A. 9, 1911), in which the court permitted a supplemental return to be filed after final judgment and discharge of the petitioner.

## CONCLUSION.

**It is prayed that this cause be set down for reargument at the earliest convenient session of this Court.**

Respectfully submitted,

ROBERT G. PAGE,
*Attorney for Respondent.*

EDWARD D. WYNOT,
*Of Counsel.*

January 14, 1943

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## Certificate Under Rule 33.

ROBERT G. PAGE, attorney for the respondent, certifies that he is a member of the Bar of this Court; that he has read the foregoing petition and knows the contents thereof; and that the foregoing petition is submitted in good faith and not for purposes of delay.

ROBERT G. PAGE.

Washington, D. C.,
January 15, 1943.

## Exhibit A.

*Affidavit of Frank J. Walsh, Attorney for Respondent Before the Court Below.*

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1942

No. 79

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WILLIAM A. ADAMS, Warden of the City Prison of Manhattan, and JAMES E. MULCAHY, United States Marshal,

Petitioners,

v.

THE UNITED STATES OF AMERICA, ex rel. GENE MCCANN,

Respondent.

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On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

State of New York,
County of Bronx—ss.:

FRANK J. WALSH, being duly sworn, deposes and says:

1. I reside at Number 831 Waring Avenue, Borough of the Bronx, New York City, and am a practicing attorney of the Supreme Court of the State of New York, having been admitted to the Bar of the First Judicial Department on November 13th 1923.

2. On February 20th 1942, the respondent herein was appearing before the Circuit Court of Appeals for the Second Circuit for oral argument upon a pending applica-

*Exhibit A.*

*Affidavit of Frank J. Walsh, Attorney for Respondent Before the Court Below* (continued).

tion he had made for certain relief to permit him to perfect his appeal at the place of his custody. I was present in the Courtroom on that day and, upon learning that the respondent was without an attorney and without funds to retain one, and after examining the papers on file in the Trial Court and its Clerk's trial minutes and learning that the respondent was convicted without counsel and a jury trial, I volunteered to act as his attorney without compensation. Whereupon, the respondent accepted my offer and pointed out to the Court below that I was not a member of the Bar of that Court but it granted me special permission to appear and make oral application for his discharge from custody upon the ground that his conviction was invalid in that the Trial Court had failed to comply with the conditions requisite and necessary to sanction his trial without counsel and a jury—as laid down by this Court in *Johnson* v. *Zerbst*, 304 U. S. 458; *Patton* v. *United States*, 281 U. S. 276, etc.

3. The oral application culminated in the per curiam opinion, dated March 3rd 1942 (Government's brief, Appendix B, pp. 57-58), and in which the Court below stated that respondent "may, if he wishes, have a writ of habeas corpus issued out of this court upon a duly verified petition stating the circumstances by which he asserts he was improperly deprived of a trial by jury. The Warden of the City Prison is requested to allow him access to a notary public to verify such a petition after it has been prepared presumably by the attorney who filed the brief now before us."

4. Pursuant to the said per curiam opinion, I prepared the original petition, sworn to March 12th 1942, which appears as Appendix D to the Government's brief (pp. 64-68).

*Exhibit A.*

*Affidavit of Frank J. Walsh, Attorney for Respondent Before the Court Below* (continued).

5. A writ of habeas corpus issued out of the Court below on the same day was returnable on the 16th of March 1942 but was adjourned to March 18th.

6. To the aforesaid original petition, the Government filed a return, sworn to March 16th 1942, a copy of which was served on me and is annexed hereto and marked Exhibit 1.

7. The respondent prepared an affidavit in reply to this return, sworn to March 18th 1942, the original of which is annexed hereto and marked as Exhibit 2.

8. At the hearing on March 18th 1942, on the return of the original petition, there was handed up to the Court below the said original petition (pp. 64-68, Gov's brief), the Government's return thereto (Exhibit 1 annexed hereto), and the respondent's reply affidavit to the said return (Exhibit 2 annexed hereto). After examining the said original petition, return and respondent's reply thereto, Judge Learned Hand stated that the return and the respondent's reply thereto raised many disputed questions of fact which may make it necessary for the Court to hold hearings to determine them. Judge Hand further stated that he thought the case could be disposed of on the bare question of law, namely: whether the respondent's constitutional rights were violated by the Trial Court in permitting him to waive a trial by jury without the advice of counsel.

9. Judge Hand then stated that the Court would return the papers if counsel for the respondent cared to file an amended petition eliminating all disputed questions of fact and confined only to that one question of law. I accepted the Court's suggestion and withdrew the original petition and respondent's reply to the Government's return. However, one copy of the original petition was inadvertently left in the possession of the Clerk of the Circuit Court and

*Exhibit A.*

*Affidavit of Frank J. Walsh, Attorney for Respondent Before the Court Below* (continued).

is still in his files with a clear penciled notation thereon, per Deputy Clerk Mr. Bell, stating that the original petition was withdrawn by Mr. Walsh, myself, at the suggestion of the Court.

10. Thereafter, I served and filed the amended petition (R. pp. 2-3) on and sworn to March 20th 1942, to which the Government filed its return, sworn to March 20th 1942 (R. pp. 4-7), which return was substantially the same as the return it filed to the original petition (Exhibit 1 annexed hereto).

11. Prior to the filing of the Government's return to the amended petition, the respondent apparently anticipating the possibility that the Government would inject disputed questions of fact into its return to his amended petition, had prepared a supplemental affidavit, sworn to March 20th 1942, to serve as a reply to the Government's return if it raised disputed questions of fact. The original of the respondent's said supplemental affidavit is annexed hereto as Exhibit 3.

12. The respondent, after reading the Government's return to the amended petition, instructed me that under no circumstances should I leave uncontroverted the disputed questions of fact raised therein and directed me to file his said supplemental affidavit in reply thereto (Exhibit 3 annexed hereto), if I thought such filing would not delay the Court's decision.

13. It appeared to me at the time that the Government, in raising disputed questions of fact in its return, had violated the general understanding arrived at before the Court below pursuant to which I withdrew, at the suggestion of the Court, the original petition and respondent's reply to the Government's original return and thereafter filed the amended petition.

*Exhibit A.*

*Affidavit of Frank J. Walsh, Attorney for Respondent Before the Court Below* (continued).

14. From the various suggestions of and discussions before the Court below, I was convinced that it would take no cognizance of the disputed questions of fact raised in the Government's return to the amended petition and I, therefore, disregarded the respondent's instructions to file his supplemental affidavit in reply thereto as I thought it might delay the Court's decision.

15. Throughout all of the proceedings had in the Court below I was convinced that it ultimately would dispose of the case upon the bare question of law it had suggested at the time I withdrew the original petition and upon which it subsequently decided it in the respondent's favor.

16. I then believed and now believe that the respondent was not advised of his constitutional rights to have counsel appointed to him without expense or otherwise nor of his constitutional rights to be tried by a jury. Had I not been convinced that the Court below would decide the case on the only point of law upon which it ultimately did decide it, I would have insisted that those issues be decided and never would have withdrawn the original petition and respondent's reply to the Government's return thereon, nor would I have permitted to be made the incomplete record upon which was based the decision of this Court of December 21st 1942.

(Signed) FRANK J. WALSH.

Sworn to before me this

9th day of January 1943.

(Signed) SIMON ALVIN KIMMEL.

Notary Public.

Bronx Co. Clk's No. 86. Reg. No. 78-K-44.

Commission Expires March 30, 1944.

(Seal)

## Exhibit B (Annexed as Exhibit 1 to Mr. Walsh's Affidavit).

*Government's Return to the Respondent's Original Petition.*

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

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UNITED STATES OF AMERICA ex rel. GENE MCCANN,
Petitioner,

—v—

WILLIAM A. ADAMS, Warden of the City Prison of Manhattan, 125 White Street, New York City, and/or the UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK,

Respondents.

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RETURN TO WRIT OF HABEAS CORPUS.

C 109/231.

JAMES MULCAHY, United States Marshal for the Southern District of New York and one of the alternate respondents herein, by Leo Lowenthal, Chief Deputy United States Marshal, for his return to the writ of habeas corpus herein and his answer to the petition:

1. Denies upon information and belief each and every allegation contained in paragraphs numbered 2nd, 3rd, 4th and 5th.

The respondent, further answering the said petition, alleges:

2. As United States Marshal for the Southern District of New York, respondent received a regular commitment under the seal of the United States District Court for

*Exhibit B (Annexed as Exhibit 1 to Mr. Walsh's Affidavit). Government's Return to the Respondent's Original Petition* (continued).

the Southern District of New York and has at all times been ready to deliver the body of Gene McCann, the prisoner mentioned therein, to a United States penitentiary to serve the sentence imposed upon him, but has been stayed from so doing by the filing of a notice of appeal.

3. Upon information and belief, the petitioner was at all times aware of his constitutional rights to the advice and assistance of counsel and to a jury trial and did knowingly waive both rights with full knowledge of the significance of such acts.

4. Upon information and belief, petitioner was indicted on or about February 18, 1941, and upon arraignment on said indictment, requested an adjournment thereof pending the making by him of a motion to quash the indictment for various reasons.

5. Upon information and belief, the aforesaid motion having been made upon voluminous papers and decided adversely to the petitioner herein, petitioner applied to this Court for a writ of mandamus to compel the District Court to grant his motion, which application was denied.

6. Upon information and belief, upon petitioner's refusing to enter a plea of either guilty or not guilty to the indictment, the District Court ordered that a plea of not guilty be entered, and advised the petitioner to retain counsel to defend him, which petitioner refused to do, stating in substance that he desired to represent himself, that the case was very complicated, and that he was so familiar with its details that no attorney would be able to give him as competent representation as he would be able to give himself.

7. Upon information and belief, thereafter petitioner brought three more motions in succession, seeking various forms of relief, all of which were prepared and argued by himself.

*Exhibit B (Annexed as Exhibit 1 to Mr. Walsh's Affidavit). Government's Return to the Respondent's Original Petition* (continued).

8. Upon information and belief, the trial commenced on July 7, 1941. When the case was called for trial in the Calendar Part of the District Court, the Court, Hon. Merrill E. Otis presiding (who subsequently tried the case), inquired of the petitioner whether he had counsel; petitioner replied he desired to represent himself; the Court inquired whether he was admitted to the Bar; petitioner replied that he was not, but that he had studied law, and was sufficiently familiar therewith adequately to defend himself, and was more familiar with the complicated facts of his case than any attorney could ever be.

9. Upon information and belief, petitioner then moved to have the case tried without a jury by the judge alone. There was a brief discussion between the Court, the petitioner, and the Assistant United States Attorney, at which it was determined that a form of waiver of petitioner's constitutional right to a jury trial should be prepared by the Assistant United States Attorney which would in every respect conform to the law as laid down by the Supreme Court of the United States. Such a waiver was prepared and a copy thereof is hereto annexed and marked "Exhibit A". It was executed in writing by the petitioner and approved by the Assistant United States Attorney and by the Court.

10. Upon information and belief, the trial which ensued took two and a half weeks, during which the defendant represented himself without counsel.

11. Upon information and belief, he was convicted and sentenced, and filed an appeal and has up to this time and is at this very moment conducting his appeal in person although this Court, as did the Court below, has at times suggested to him the advisability of his retaining counsel.

12. Upon information and belief, at petitioner's trial in

*Exhibit B (Annexed as Exhibit 1 to Mr. Walsh's Affidavit). Government's Return to the Respondent's Original Petition* (continued).

the Court below, testimony disclosed that petitioner in person had in 1933 brought suit in the United States District Court against over six hundred individual defendants, demanding thirty million dollars damages for conspiracy in restraint of his trade, and had represented himself therein in person although he had been assisted at the trial thereof in 1936 by an attorney who appeared only, however, as "of counsel" to the petitioner. Testimony also disclosed that the petitioner conducted his own appeal in that matter without the aid of counsel to this Court and to the Supreme Court of the United States. The testimony also disclosed that the petitioner had brought suit, prior to his indictment, in the Supreme Court of the State of New York against Joseph Brieloff and others who were subsequently named in the indictment as "victims", had conducted the case in person without counsel and had tried it in person in the said Supreme Court. Respondent refers to this testimony to show petitioner's familiarity with courts and legal proceedings and the falsity of petitioner's statements in paragraphs numbered 2nd and 3rd of his petition that he was not aware of his constitutional right to counsel.

WHEREFORE, respondent prays that the writ of habeas corpus be dismissed and the relator be remanded to the custody of the United States Marshal for the Southern District of New York to be dealt with in accordance with law.

JAMES MULCAHY by
LEO LOWENTHAL.
JAMES MULCAHY, Respondent
by LEO LOWENTHAL, Chief Deputy
United States Marshal.

*Exhibit B (Annexed as Exhibit 1 to Mr. Walsh's Affidavit). Government's Return to the Respondent's Original Petition* (continued).

State of New York,
County of New York,
Southern District of New York—ss.:

LEO LOWENTHAL, Chief Deputy United States Marshal for the Southern District of New York, being duly sworn, deposes and says that he is acting for James Mulcahy, United States Marshal; that he has read the foregoing return and knows the contents thereof; that the same is true to his own knowledge except such matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

Sources of deponent's knowledge and grounds of his belief as to all matters herein alleged upon information and belief consist of the official docket of the United States District Court for the Southern District of New York, and statements made to him by Richard J. Burke, Assistant United States Attorney for the Southern District of New York.

Leo Lowenthal.
LEO LOWENTHAL.

Sworn to before me this
16th day of March, 1942.

*Exhibit B (Annexed as Exhibit 1 to Mr. Walsh's Affidavit), Government's Return to the Respondent's Original Petition* (continued).

"EXHIBIT A".

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,

—v—

GENE McCANN,

Defendant.

I, GENE McCANN, the defendant herein, appearing personally, do hereby waive a trial by jury in the above entitled case, having been advised by the Court of my constitutional rights.

Dated: New York, N. Y., July 7, 1941.

GENE McCANN (signed)
Defendant, appearing personally

Consented to:

RICHARD J. BURKE (signed)
Assistant United States Attorney

SO ORDERED:

MERRILL E. OTIS
U. S. District Judge

*Exhibit B (Annexed as Exhibit 1 to Mr. Walsh's Affidavit). Government's Return to the Respondent's Original Petition* (continued).

UNITED STATES CIRCUIT OF APPEALS

FOR THE SECOND CIRCUIT.

---

UNITED STATES OF AMERICA ex rel. GENE MCCANN,

Petitioner,

—v—

WILLIAM A. ADAMS, Warden of the City Prison of Manhattan, 125 White Street, New York City, and/or the UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK,

Respondents.

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## AFFIDAVIT.

C 109/231.

RICHARD J. BURKE, being duly sworn, deposes and says that he is an Assistant United States Attorney for the Southern District of New York and is in charge of the prosecution of the above matter on behalf of the United States Marshal for the Southern District of New York.

That he has read the foregoing return to the writ of habeas corpus and knows the contents thereof, and the same is true to his own knowledge, including all matters therein stated to be alleged on information and belief.

Richard J. Burke
RICHARD J. BURKE

Sworn to before me this
16th day of March, 1942.

## Exhibit C (Annexed as Exhibit 2 to Mr. Walsh's Affidavit).

*Petitioner's Affidavit in Reply to the Government's Return to His Original Petition* (continued).

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

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UNITED STATES OF AMERICA, ex rel. GENE MCCANN,
Petitioner,

For a Writ of Habeas Corpus

—against—

WILLIAM A. ADAMS, Warden of City Prison of Manhattan, 125 White Street, New York City, and/or the United States Marshal for the Southern District of New York,
Respondents.

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PETITIONER'S AFFIDAVIT IN REPLY TO THE OPPOSING RETURN.

County of New York,
State of New York—ss.:

GENE MCCANN, being duly sworn, deposes and says:

1. I am the petitioner herein and I make this affidavit in reply to the hearsay and other averments alleged, mainly upon information and belief, in the Return interposed by the respondent James Mulcahy, United States Marshal for the Southern District of New York, by Leo Lowenthal, Chief Deputy United States Marshal, in opposition to my petition for a writ of habeas corpus.

2. I deny that I was aware of my constitutional rights to advice and assistance of counsel without expense to me or otherwise and to a jury trial at the time I plead to the indictment or prior to or during the trial of the case at bar.

*Exhibit C (Annexed as Exhibit 2 to Mr. Walsh's Affidavit). Petitioner's Affidavit in Reply to the Government's Return to His Original Petition* (continued).

3. I deny that I at any time knowingly, expressly, impliedly or otherwise waived my constitutional rights to the advice and assistance of counsel.

4. I also deny that I knowingly waived my constitutional rights to a jury trial with full knowledge of the significance of such act.

5. I did not become aware of either of these constitutional rights until February 20th 1942 when, in the Courtroom of this Court, I was advised thereof by Frank J. Walsh, Esq., who appears as my counsel on the instant application.

6. The indictment herein was returned by the January 1941 Grand Jury of the Court below whose Foreman, C. Douglass Greene, was then a partner of Post & Flagg, members of the New York Stock Exchange and defendants in my then pending and bitterly contested civil action against his said partnership firm and others under the New York Anti-Trust Law (Donnelly Act) for a restraint of my intrastate business. The title of said action is *Gene McCann* v. *Richard Whitney as President of the New York Stock Exchange, et al.* (New York County Supreme Court).

7. While the presentment was being made to the grand jury I requested its Foreman to be heard upon a waiver of immunity in accordance with the requirements of Section 257 of the New York Code of Criminal Procedure, as amended, and my request was denied.

8. Before I plead to the indictment I moved the Court below to quash it or to hold a preliminary hearing to that end upon the ground that:

(a) The Foreman and eight other members of the jury were prejudiced and disqualified to sit on a

*Exhibit C (Annexed as Exhibit 2 to Mr. Walsh's Affidavit). Petitioner's Affidavit in Reply to the Government's Return to His Original Petition* (continued).

jury before which a presentment was being made against me;

(b) The indictment was void because twelve qualified jurors did not vote therefor (the Government stipulated on the trial that one qualified juror was not present and did not vote thereon and I was informed by a qualified juror that he and another qualified juror did not vote therefor);

(c) It was mandatory upon the Court to quash the indictment because the jury refused to hear me;

(d) The indictment does not state a crime on its face;

(e) And upon divers other grounds.

My motion was denied in toto and an exception was duly served and filed.

9. While a motion for leave to reargue my said motion to quash, etc., was pending I appeared before the Honorable Edward A. Conger, then presiding in the Court below, to plead to the indictment and requested the plea be postponed until said motion was decided. Judge Conger said he would enter a plea of not guilty for me and the record would show that I refused to plead. He thereupon released me and I remained on my own recognizance until after the trial.

10. I deny that Judge Conger at the time I appeared before him to plead to the indictment and that any District Court Judge at any time "advised" me "to retain counsel to defend" myself and that I "refused to do" so.

11. I also deny that I ever stated "in substance" or otherwise to Judge Conger or to any District Court Judge that I "desired to represent" myself in the case at bar and that "no attorney would be able to give" me "as competent representation as" I "would be able to give" myself.

12. Judge Conger subsequently granted my application

*Exhibit C (Annexed as Exhibit 2 to Mr. Walsh's Affidavit). Petitioner's Affidavit in Reply to the Government's Return to His Original Petition* (continued).

to defend this cause as a poor person pursuant to Section 832, Title 28, U. S. Code.

13. I deny that any Judge of this or of the Court below has at any time suggested to me the advisability of my retaining counsel.

14. I also deny the allegations in paragraph "8" of the opposing Return.

15. I admit that I made several motions directed to the validity of the indictment and argued them myself but I deny that I alone prepared the motion papers and memoranda of law interposed by me in support of the motions. I had the advice and assistance of such young attorneys as I could engage and who were willing to assist me in the preparation of such motion papers and memoranda for the few dollars I was able to pay them for the work. My oral arguments in support of the motions were based on the facts, the advice these attorneys gave me and the law set forth in the memoranda they prepared.

16. I am not an attorney and at no time have I represented myself as such.

17. Although I appeared pro se in my civil action under the Sherman Act in the Court below, entitled *Gene McCann v. New York Stock Exchange, et al.*, which was before this Court on appeal (107 Fed. [2nd] 908) and in connection with which I filed a petition for certiorari in the United States Supreme Court (No. 773 October Term 1939), Hallam M. Richardson acted as my trial counsel in that case, as disclosed by the record on file in this Court, and I had the assistance and advice of counsel in the preparation of said petition for certiorari, briefs, pleadings and all other documents having to do with that action and the respective appeals therein.

18. I also had the advice and assistance of counsel in the preparation of the pleadings and all papers and memo

*Exhibit C (Annexed as Exhibit 2 to Mr. Walsh's Affidavit). Petitioner's Affidavit in Reply to the Government's Return to His Original Petition* (continued).

randa having to do with the two civil actions, in quantum meruit, which I brought against the principle prosecuting witnesses in the case at bar to recover for work, labor and services duly performed and for the loss of prospective profits duly sustained by reason of their breach of agreements with me. I appeared pro se in both those actions but Mr. Richardson tried one of them and examined certain defendants therein before trial. I tried the other because he was engaged in Court with another case when it was reached for trial and I was unable to secure an adjournment or another competent attorney to try it at the time.

19. I deny there was before the Court below at any time any facts or testimony with respect to my prosecution of the aforesaid civil litigation and my appearance therein pro se that is contrary to the facts hereinabove stated.

20. The trial of this cause was repeatedly postponed from week to week and when I appeared in Court on July 7th 1941 I verily believed my appearance was required merely for the purpose of answering another of the routine summer calendar calls. I was not properly prepared to go to trial and I moved for an adjournment until witnesses essential to my defense returned from their summer vacations and upon other good and sufficient grounds but Judge Otis denied my application and directed that the trial proceed immediately before him.

21. Then and still believing the indictment does not state a crime on its face and that it was returned by prejudiced and disqualified jurors and being unable to secure until after a trial a review by this Court

(a) as to the validity of the indictment, and

(b) as to the respective prejudices and qualifications of the grand jurors that returned it

*Exhibit C (Annexed as Exhibit 2 to Mr. Walsh's Affidavit). Petitioner's Affidavit in Reply to the Government's Return to His Original Petition* (continued).

I, personally, without the aid or advice of counsel, and without being aware of or being advised by Judge Otis or anyone else of my constitutional rights to a jury trial consented to the waiver of a trial without a jury and to proceed to trial before Judge Otis.

22. Judge Otis thereupon directed the United States Attorney to prepare a stipulation for him and me to sign. Within a few moments thereafter the United States Attorney held before me a stipulation drawn by him. It was not before me long enough to read and carefully digest its contents nor to realize the significance thereof and it was withdrawn from my sight immediately after I hurriedly affixed my signature thereto. Although I requested the United States Attorney to furnish me with a copy of the stipulation at the time I signed it and he agreed to do so immediately I never received a copy thereof or became aware of its contents until February 27th 1942.

23. I emphatically deny the averment at paragraph "8" of the opposing Return which states:

> "There was a brief discussion between the Court, the petitioner, and the Assistant United States Attorney, at which it was determined that a form of waiver of petitioner's constitutional right to a jury trial should be prepared by the Assistant United States Attorney which would in every respect conform to the law as laid down by the Supreme Court of the United States."

No such discussion was ever had and no mention of constitutional rights or laws laid down by the Supreme Court were ever made by either Judge Otis the Assistant United States Attorney nor by myself in connection with the waiver of a jury trial nor in connection with the stipulation

*Exhibit C (Annexed as Exhibit 2 to Mr. Walsh's Affidavit). Petitioner's Affidavit in Reply to the Government's Return to His Original Petition* (continued).

I had nothing whatsoever to do with the preparation of the stipulation—the wording of which should be construed as favoring the Assistant United States Attorney who drew it.

24. I appeared before the Court below to plead to the indictment and proceeded to trial without the benefit or protection of counsel and sought to establish my innocence of the alleged crimes to the best of my ability because I was unable to defray the cost of competent counsel and I verily believed the charges were too ridiculous to ever be sustained. Especially since they were made and supported by prosecuting witnesses whose deliberate falsifications I had discovered and knew to be matters of record in documents filed by them with the Securities & Exchange Commission and the Department of Law of the State of New York, as well as in their testimony in the civil actions I brought against them after I discovered their true character which made it necessary for me to sever relations with them. Such actions were long pending in the New York Supreme Court before these prosecuting witnesses got together and had contact with the Governmental agencies that brought about the instant prosecution which is predicated upon my refusal to subject myself to civil liabilities and criminal prosecution through solicitation of subscriptions for fraudulent stock in companies controlled by them.

(Signed) GENE McCANN.

Sworn to before me this
18th day of March, 1942.

JOHN J. O'LEAR, JR.,
Notary Public.
Queens Co. No. 3194, Reg. No. 7916.
N. Y. Co. No. 215, Reg. No. 3-0-123.
Commission Expires March 30, 1943.

(Seal)

## Exhibit D (Annexed as Exhibit 3 to Mr. Walsh's Affidavit).

*Petitioner's Supplemental Affidavit in Reply to the Government's Return to His Amended Petition.*

UNITED STATES CIRCUIT OF APPEALS

FOR THE SECOND CIRCUIT.

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UNITED STATES OF AMERICA, ex rel.,
GENE MCCANN,

Petitioner.

For a Writ of Habeas Corpus

—against—

WILLIAM A. ADAMS, Warden of City Prison of Manhattan, 125 White Street, New York City, and/or the UNITED STATES MARSHAL for the Southern District of New York,

Respondents.

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PETITIONER'S SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF HIS APPLICATION FOR A WRIT OF HABEAS CORPUS.

County of New York,
State of New York—ss.:

GENE MCCANN, being duly sworn, deposes and says:

1. He is the Petitioner herein and interposes this supplemental affidavit in support of his instant application for a writ of habeas corpus.

2. Your petitioner secured an order from the Court below to defend this cause as a poor person, pursuant to Section 832, Title 28, U. S. Code, and he defended it in person.

*Exhibit D (Annexed as Exhibit 3 to Mr. Walsh's Affidavit). Petitioner's Supplemental Affidavit in Reply to the Government's Return to His Amended Petition* (continued).

3. Before your petitioner plead to the indictment, he made several motions directed to its validity and for other relief which he argued himself from his moving papers and memoranda which were prepared principally by young attorneys who were willing to do the work for the few dollars he was able to pay them therefor at the time.

4. At no time has your petitioner held himself out as an attorney or represented himself as such.

5. Although your petitioner appeared as the plaintiff in person in his civil action under the Sherman Act in the Court below, entitled *Gene McCann* v. *New York Stock Exchange*, et al. (L. 55-231) which action was before this Court on appeal (107 Fed. [2nd] 908), and in connection with which your petitioner filed a petition for certiorari in the United States Supreme Court (No. 773 October Term 1939), Hallam M. Richardson, Esq., acted as your petitioner's trial counsel in that case, as disclosed by the Record on file in this and the Supreme Court, and he had the assistance and advice of counsel in the preparation of said petition for certiorari, briefs, pleadings and all other documents having to do with his prosecution of that action and the respective appeals therein.

6. Your petitioner also had the advice and assistance of counsel in the preparation of the pleadings and all papers and memoranda having to do with the two civil actions which he brought in quantum meruit against the principle prosecuting witnesses in the case at bar to recover for work, labor, services and loss of prospective profits. These civil actions were long pending before such witnesses appeared before the Grand Jury which returned the indictment in the case at bar. Your petitioner appeared as the plaintiff in person in both those civil actions but Mr.

*Exhibit D (Annexed as Exhibit 3 to Mr. Walsh's Affidavit). Petitioner's Supplemental Affidavit in Reply to the Government's Return to His Amended Petition* (continued).

Richardson tried one of them and examined certain defendants therein before trial. Your petitioner tried the other because Mr. Richardson was not available at the time it was reached for trial and your petitioner was unable to secure an adjournment or other competent counsel to try it.

7. While an application for reargument of a motion denying a quashal of the indictment was pending in the Court below, your petitioner appeared before the Honorable Edward A. Conger, then presiding therein, to plead to the indictment and requested the plea be postponed until said application was decided. Judge Conger said he would enter a plea of not guilty for your petitioner and the record would show that your petitioner refused to plead. He thereupon released your petitioner and he remained on his own recognizance until after the trial.

8. Your petitioner defended this cause in person because he was without income, funds or other assets with which to pay for the services of competent counsel.

9. At no time did the Court below offer to assign counsel or the assistance of counsel to your petitioner in this cause nor advise him of his constitutional rights thereto nor did he specifically waive such rights.

10. At no time did the Court below nor anyone else advise your petitioner of his constitutional rights to a jury trial of this cause.

11. Your petitioner did not become aware of his constitutional rights to the advice and assistance of counsel in this cause, without expense to him or otherwise, nor of his constitutional rights to a jury trial until February 20th 1942 when, in the Courtroom of this Court, he was advised thereof by Frank J. Walsh Esq., who appears as

*Exhibit D (Annexed as Exhibit 3 to Mr. Walsh's Affidavit). Petitioner's Supplemental Affidavit in Reply to the Government's Return to His Amended Petition* (continued).

your petitioner's attorney on his instant application for a writ of habeas corpus.

12. Your petitioner consented to a trial of this cause without a jury and he hurriedly signed a stipulation, prepared by the United States Attorney, waiving his constitutional rights thereto without carefully reading it or realizing the significance of its contents or of the significance of his acts and all without the advice or assistance of counsel.

13. Although your petitioner requested the United States Attorney to furnish him with a copy of the stipulation at the time he signed it and the United States Attorney agreed to do so immediately, your petitioner never received a copy thereof until February 27th 1942 and he was not fully cognizant of its contents until several days prior thereto.

(Signed) Gene McCann.
GENE McCANN.

Sworn to before me this
20th day of March 1942.
THOS. D. ROMANELLA,
Notary Public.
Queens County No. 1546, Queens County Reg. No. 6961.
New York County No. 663, New York Co. Reg. No. 3-R-411.
Term Expires March 30, 1943.

## Exhibit E.

*Trial Court's Stenographer's Minutes.*

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA

vs.

GENE McCANN

State of New York,
County of New York—ss.:

SAMUEL BRUCKHEIMER, being duly sworn, deposes and says: that I have been a Certified Shorthand Reporter for more than twenty years, and that as such I was employed by Southern District Court Reporters to report the proceedings in the above case and that the attached page is a true and accurate transcript of my shorthand notes.

(Signed) SAMUEL BRUCKHEIMER.

Sworn and subscribed to before me this
7th day of January, 1943.
(Signed) W. G. BRIGGS.

Notary Public, Bronx County.
Bronx Co. Clk's No. 123.
N. Y. Co. Clk's No. 1005.
Commission Expires March 30, 1943.

*Exhibit E.*

*Trial Court's Stenographer's Minutes* (continued).

"(July 7, 1941)

Before HON. MERRILL E. OTIS

Mr. McCann: I move the Court to try the case of the United States of America v. Gene McCann without a jury and have the case tried by the presiding Judge.

The Court: Defendant, in his own proper person, having moved for a trial of the case without a jury and having said in open court he will sign the consent as soon as drawn, and the Government consenting, the motion is granted. If counsel wishes to make any motion in addition I want the record to show what the application is, who the witnesses are who have not been served, what they will testify to, so that I can determine whether their testimony is material or not material.

* * * * *

SOUTHERN DISTRICT COURT REPORTERS."

# SUPREME COURT OF THE UNITED STATES.

No. 79.—October Term, 1942.

| | |
|---|---|
| William A. Adams, Warden of the City Prison of Manhattan, and James E. Mulcahy, United States Marshal, Petitioners, *vs.* The United States of America, *ex rel.* Gene McCann. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit. |

[December 21, 1942.]

Mr. Justice Frankfurter delivered the opinion of the Court

This is a review of an order by the Circuit Court of Appeals for the Second Circuit discharging the relator McCann from custody. We accept as facts, as did the court below, those set forth in the untraversed return to the writ of *habeas corpus* in that court.

McCann was indicted on six counts for using the mails to defraud, in violation of Section 215 of the Criminal Code, 18 U. S. C. § 338. From the time of his arraignment on February 18, 1941, to the prosecution of his appeal in the court below, McCann insisted on conducting his case without the assistance of a lawyer. When called upon to plead to the indictment, he refused to do so; a plea of not guilty was entered on his behalf. The district court at that time advised McCann to retain counsel. He refused, however, "stating in substance that he desired to represent himself, that the case was very complicated, and that he was so familiar with its details that no attorney would be able to give him as competent representation as he would be able to give himself".

When the case came on for trial on July 7, 1941, McCann repeated, in reply to the judge's inquiry whether he had counsel, that he wished to represent himself. In response to the court's further inquiry whether he was admitted to the bar, McCann "replied that he was not, but that he had studied law, and was sufficiently familiar therewith adequately to defend himself, and was more familiar with the complicated facts of his case than any attorney

could ever be."[1] McCann "then moved to have the case tried without a jury by the judge alone. There was a brief discussion between the Court, the petitioner, and the Assistant United States Attorney", after which McCann submitted the following over his signature: "'I, Gene McCann, the defendant herein, appearing personally, do hereby waive a trial by jury in the above entitled case, having been advised by the Court of my constitutional rights.'" The Assistant United States Attorney consented, and the judge (one of long trial experience and tested solicitude for the civilized administration of criminal justice) entered an order approving this "waiver".

The trial then got under way. It lasted for two weeks and a half, and throughout the entire proceedings McCann represented himself. He was convicted on July 22, 1941, and was sentenced to imprisonment for six years and to pay a fine of $600. He took an appeal, and the trial judge fixed bail at $10,000. Being unable to procure this sum, he remained in custody. Then followed applications to the Circuit Court of Appeals, likewise pressed by McCann himself, for extending the time for filing a bill of exceptions. In these proceedings both the trial and appellate courts again suggested to McCann the advisability of being represented by counsel. After having personally made these numerous applications, McCann finally secured the assistance of an attorney. The latter applied to the Circuit Court of Appeals for reduction of bail. It was so reduced. But at the same time the court suggested that McCann take out a writ of *habeas corpus*, returnable to the court, to raise the question whether, in the circumstances of the case, "the judge had jurisdiction to try him".

As is pointed out in the opinion of the Circuit Court of Appeals, "At no time did he [McCann] indicate that he wished a jury or that he repented of his consent—either while the cause was in the district court or in this court—until the attorney, who now represents him, in March, 1942, raised the point" at the court's invitation. The "point" thus projected into the case by the Circuit Court of Appeals was presented, in its own words, "in the barest possible form: Has an accused, who is without counsel, the power at his

[1] McCann had brought suit in 1933 against the New York Stock Exchange, its officers and members; the Better Business Bureau of New York, and a large number of other persons, seeking thirty million dollars damages for conspiracy in restraint of trade. He represented himself in this extensive litigation, and personally brought appeals to the Circuit Court of Appeals and to this Court. See McCann v. New York Stock Exchange, 80 F. 2d 211; 107 F. 2d 908; 309 U. S. 684.

own instance to surrender his right of trial by jury when indicted for felony?"[2] The Circuit Court of Appeals, with one judge dissenting, answered this question in the negative. It held that no person accused of a felony—who is himself not a lawyer—can waive trial by a jury, no matter how capable he is of making an intelligent, informed choice and how strenuously he insists upon such a choice, unless he does so upon the advice of an attorney. 126 F. 2d 774. The obvious importance of this question to the administration of criminal justice in the federal courts led us to bring the case here. 316 U. S. 655.

A jurisdictional obstacle to a consideration of this issue is pressed before us. It is urged that the Circuit Court of Appeals had no jurisdiction to issue the writ of *habeas corpus* in this case. The discussion of this question took an extended range in the arguments at the bar, but in the circumstances of this case the matter lies within a narrow compass. Uninterruptedly from the first Judiciary Act (Section 14 of the Act of September 24, 1789, 1 Stat. 73, 81), to the present day (Section 262 of the Judicial Code, 28 U. S. C. § 377), the courts of the United States have had powers of an auxiliary nature "to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law". In *Whitney* v. *Dick*, 202 U. S. 132, this Court held that where no proceeding of an appellate character is pending in a circuit court of appeals, the authority to issue auxiliary writs does not come into operation. A circuit court of appeals cannot issue the writ of *habeas corpus* as "an independent and original proceeding challenging *in toto* the validity of a judgment rendered in another court". But the Court also recognized that there was power to issue the writ "where it may be necessary for the exercise of a jurisdiction already existing". 202 U. S. at 136-37. In the case at bar a proceeding of an appellate character was pending in the Circuit Court of Appeals, for McCann had already filed an appeal from the judgment of conviction. There was, therefore, "a jurisdiction already existing" in the Circuit Court of Appeals. But could the issuance of the writ be deemed "necessary for the exercise" of that jurisdiction?

[2] Felony, it may not be irrelevant to note, is a verbal survival which has been emptied of its historic content. Under the federal Criminal Code all offenses punishable by death or imprisonment for more than a year are felonies. Section 335 of the Criminal Code, 18 U. S. C. § 541.

Procedural instruments are means for achieving the rational ends of law. A circuit court of appeals is not limited to issuing a writ of *habeas corpus* only when it finds that it is "necessary" in the sense that the court could not otherwise physically discharge its appellate duties. Unless appropriately confined by Congress, a federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it. Undoubtedly therefore, the Circuit Court of Appeals had "jurisdiction", in the sense that it had the power, to issue the writ as an incident to the appeal then pending before it. The real question is whether the Circuit Court of Appeals abused its power in exercising that jurisdiction in the situation that confronted it.

Of course the writ of *habeas corpus* should not do service for an appeal. *Glasgow v. Moyer*, 225 U. S. 420, 428; *Matter of Gregory*, 219 U. S. 210, 213. This rule must be strictly observed if orderly appellate procedure is to be maintained. Mere convenience cannot justify use of the writ as a substitute for an appeal. But dry formalism should not sterilize procedural resources which Congress has made available to the federal courts. In exceptional cases where, because of special circumstances, its use as an aid to an appeal over which the court has jurisdiction may fairly be said to be reasonably necessary in the interest of justice, the writ of *habeas corpus* is available to a circuit court of appeals.

The circumstances that moved the court below to the exercise of its jurisdiction were the peculiar difficulties involved in preparing a bill of exceptions. The stenographic minutes had never been typed. The relator claimed that he was without funds. Since he was unable to raise the bail fixed by the trial judge, he had been in custody since sentence and therefore had no opportunity to prepare a bill of exceptions. The court doubted "whether any [bill] can ever be made up on which the appeal can be heard . . . In the particular circumstances of the case at bar, it seems to us that the writ is 'necessary to the complete exercise' of our appellate jurisdictions because . . . there is a danger that it cannot be otherwise exercised at all and a certainty that it must in any event be a good deal hampered".

The court below recognized, however, that a bill of exceptions might be prepared which would be confined to the single point

raised by the writ of *habeas corpus*. This is the basis for the contention that the writ of *habeas corpus* in this case performs the function of an appeal. But inasmuch as McCann was urging a number of grounds for the reversal of his conviction, including the sufficiency of the evidence, the Circuit Court of Appeals was justified in concluding that it would not be fair to make him stake his whole appeal on the single point raised by this writ. We cannot say that the court was unreasonable in the view it took of the situation with which it was presented and with which it was more familiar than the printed record alone can reveal. The writ of *habeas corpus* was not a substitute for the pending appeal, and was therefore not improvidently entertained by the court below.

This brings us to the merits. They are controlled in principle by *Patton* v. *United States*, 281 U. S. 276, and *Johnson* v. *Zerbst*, 304 U. S. 458. The short of the matter is that an accused, in the exercise of a free and intelligent choice, and with the considered approval of the court, may waive trial by jury, and so likewise may he competently and intelligently waive his Constitutional right to assistance of counsel. There is nothing in the Constitution to prevent an accused from choosing to have his fate tried before a judge without a jury even though, in deciding what is best for himself, he follows the guidance of his own wisdom and not that of a lawyer. In taking a contrary view, the court below appears to have been largely influenced by the radiations of this Court's opinion in *Glasser* v. *United States*, 315 U. S. 60. But *Patton* v. *United States*, *supra*, and *Johnson* v. *Zerbst*, *supra*, were left wholly unimpaired by the ruling in the *Glasser* case.

Certain safeguards are essential to criminal justice. The court must be uncoerced, *Moore* v. *Dempsey*, 261 U. S. 86, and it must have no interest other than the pursuit of justice, *Tumey* v. *Ohio*, 273 U. S. 510. The accused must have ample opportunity to meet the case of the prosecution. To that end, the Sixth Amendment of the Constitution abolished the rigors of the common law by affording one charged with crime the assistance of counsel for his defense, *Johnson* v. *Zerbst*, 304 U. S. 458. Such assistance "in the particular situation" of "ignorant defendants in a capital case" led to recognition that "the benefit of counsel was essential to the substance of a hearing", as guaranteed by the Due Process Clause of the Fourteenth Amendment, in criminal prosecutions in the state courts. *Palko* v. *Connecticut*, 302 U. S. 319, 327. Compare *Powell* v. *Alabama*, 287

U. S. 45, and *Betts* v. *Brady*, 316 U. S. 455. The relation of trial by jury to civil rights—especially in criminal cases—is fully revealed by the history which gave rise to the provisions of the Constitution which guarantee that right. Article III, Section 2, paragraph 3; Sixth Amendment; Seventh Amendment. That history is succinctly summarized in the Declaration of Independence in which complaint was made that the Colonies were deprived "in many cases, of the benefits of Trial by Jury". But procedural devices rooted in experience were written into the Bill of Rights not as abstract rubrics in an elegant code but in order to assure fairness and justice before any person could be deprived of "life, liberty or property".

It hardly occurred to the framers of the original Constitution and of the Bill of Rights that an accused, acting in obedience to the dictates of self-interest or the promptings of conscience, should be prevented from surrendering his liberty by admitting his guilt. The Constitution does not compel an accused who admits his guilt to stand trial against his own wishes. Legislation apart, no social policy calls for the adoption by the courts of an inexorable rule that guilt must be determined only by trial and not by admission. A plea of guilt expresses the defendant's belief that his acts were proscribed by law and that he cannot successfully be defended. It is true, of course, that guilt under Section 215 of the Criminal Code, which makes it a crime to use the mails to defraud, depends upon answers to questions of law raised by application of the statute to particular facts. It is equally true that prosecutions under other provisions of the Criminal Code may raise even more difficult and complex questions of law. But such questions are no less absent when a man pleads guilty than when he resists an accusation of crime. And not even now is it suggested that a layman cannot plead guilty unless he has the opinion of a lawyer on the questions of law that might arise if he did not admit his guilt. Plainly, the engrafting of such a requirement upon the Constitution would be a gratuitous dislocation of the processes of justice. The task of judging the competence of a particular accused cannot be escaped by announcing delusively simple rules of trial procedure which judges must mechanically follow. The question in each case is whether the accused was competent to exercise an intelligent, informed judgment—and for determination of this question it is of course relevant whether he had the advice of counsel.

But it is quite another matter to suggest that the Constitution unqualifiedly deems all accused incompetent unless he does have the advice of counsel. If a layman is to be precluded from defending himself because the Constitution is said to make him helpless without a lawyer's assistance on questions of law which abstractly underlie all federal criminal prosecutions, it ought not to matter whether the decision he is called upon to make is that of pleading guilty or of waiving a particular mode of trial. Every conviction, including the considerable number based upon pleas of guilty, presupposes at least a tacit disposition of the legal questions involved.

We have already held that one charged with a serious federal crime may dispense with his Constitutional right to jury trial, where this action is taken with his express, intelligent consent, where the Government also consents, and where such action is approved by the responsible judgment of the trial court. *Patton* v. *United States*, 281 U. S. 276.[3] And whether or not there is an intelligent, competent, self-protecting waiver of jury trial by an accused must depend upon the unique circumstances of each case. The less rigorous enforcement of the rules of evidence, the greater informality in trial procedure—these are not the only advantages that the absence of a jury may afford to a layman who prefers to make his own defense. In a variety of subtle ways trial by jury may be restrictive of a layman's opportunities to present his case as freely as he wishes. And since trial by jury confers burdens as well as benefits, an accused should be permitted to forego its privileges when his competent judgment counsels him that his interests are safer in the keeping of the judge than of the jury.

But we are asked here to hold that an accused person cannot waive trial by jury, no matter how freely and understandingly he surrenders that right, unless he acts on a lawyer's advice. In other words, although a shrewd and experienced layman may, for his own sufficient reasons, conduct his own defense if he prefers to do so, nevertheless if he does do so the Constitution requires that he

[3] The ruling of the *Patton* case, namely, that the provisions of the Constitution dealing with trial by jury in the federal courts were "meant to confer a right upon the accused which he may forego at his election", 281 U. S. at 298, was expressly recognized and acted upon by Congress in the Act of March 8, 1934, c. 49, 48 Stat. 399, which empowered the Supreme Court to prescribe rules of practice and procedure with respect to "proceedings after verdict, *or finding of guilt by the court if a jury has been waived*, or plea of guilty, in criminal cases in district courts of the United States. . . ." (Italics added.) Compare H. Rep. No. 858, Sen. Rep. No. 257, 73d Cong., 2d Sess.

must defend himself before a jury and not before a judge. But we find nothing in the Constitution, or in the great historic events which gave rise to it, or the history to which it has given rise, to justify such interpolation into the Constitution and such restriction upon the rational administration of criminal justice.

The right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms. They rest on considerations that go to the substance of an accused's position before the law. The public conscience must be satisfied that fairness dominates the administration of justice. An accused must have the means of presenting his best defense. He must have time and facilities for investigation and for the production of evidence. But evidence and truth are of no avail unless they can be adequately presented. Essential fairness is lacking if an accused cannot put his case effectively in court. But the Constitution does not force a lawyer upon a defendant. He may waive his Constitutional right to assistance of counsel if he knows what he is doing and his choice is made with eyes open. *Johnson* v. *Zerbst*, 304 U. S. 458, 468-69.

Referring to jury trials, Mr. Justice Cardozo, speaking for the Court, had occasion to say, "Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them." *Palko* v. *Connecticut*, 302 U. S. at 325. Putting this thought in more generalized form, the procedural safeguards of the Bill of Rights are not to be treated as mechanical rigidities. What were contrived as protections for the accused should not be turned into fetters. To assert as an absolute that a layman, no matter how wise or experienced he may be, is incompetent to choose between judge and jury as the tribunal for determining his guilt or innocence, simply because a lawyer has not advised him on the choice, is to dogmatize beyond the bounds of learning or experience. Were we so to hold, we would impliedly condemn the administration of criminal justice in states deemed otherwise enlightened merely because in their courts the vast majority of criminal cases are tried before a judge without a jury. To deny an accused a choice of procedure in circumstances in which he, though a layman, is as capable as any lawyer of making an intelligent choice, is to impair the worth of great Constitutional safeguards by treating them as empty verbalisms.

Underlying such dogmatism is distrust of the ability of courts to accommodate judgment to the varying circumstances of indi-

vidual cases. But this is to express want of faith in the very tribunals which are charged with enforcement of the Constitution. "Universal distrust", Mr. Justice Holmes admonished us, "creates universal incompetence." *Graham* v. *United States*, 231 U. S. 474, 480. When the administration of the criminal law in the federal courts is hedged about as it is by the Constitutional safeguards for the protection of an accused, to deny him in the exercise of his free choice the right to dispense with some of these safeguards (when such surrenders are as jealously guarded as they are by our rulings in *Patton* v. *United States, supra*, and *Johnson* v. *Zerbst, supra*), and to base such denial on an arbitrary rule that a man cannot choose to conduct his defense before a judge rather than a jury unless, against his will, he has a lawyer to advise him, although he reasonably deems himself the best advisor for his own needs, is to imprison a man in his privileges and call it the Constitution. For it is neither obnoxious to humane standards for the administration of justice as these have been written into the Constitution, nor violative of the rights of any person accused of crime who is capable of weighing his own best interest, to permit him to conduct his own defense in a trial before a judge without a jury, subject as such trial is to public scrutiny and amenable as it is to the corrective oversight of an appellate tribunal and ultimately of the Supreme Court of the Nation.

Once we reject such a doctrinaire view of criminal justice and of the Constitution, there is an end to this case. The *Patton* decision left no room for doubt that a determination of guilt by a court after waiver of jury trial could not be set aside and a new trial ordered except upon a plain showing that such waiver was not freely and intelligently made. If the result of the adjudicatory process is not to be set at naught, it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality. Simply because a result that was insistently invited, namely, a verdict by a court without a jury, disappointed the hopes of the accused, ought not to be sufficient for rejecting it. And if the record before us does not show an intelligent and competent waiver of the right to the assistance of counsel by a defendant who demanded again and again that the judge try

him, and who in his persistence of such a choice knew what he was about, it would be difficult to conceive of a set of circumstances in which there was such a free choice by a self-determining individual.

The order of the court below must therefore be set aside.

*So ordered.*

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Mr. Justice DOUGLAS, dissenting.

The *Patton* case (281 U. S. 276) held that a defendant represented by counsel might waive under certain circumstances trial by a jury of twelve and submit to trial by a jury of only eleven. In view of the strictness of the constitutional mandates I am by no means convinced that it follows that an entire jury may be waived. But assuming *arguendo* that it may be, I think the respondent should have had the benefit of legal advice before his waiver of a jury trial was accepted by the District Court. For I do not believe that we can safely assume that in absence of legal advice a waiver by a layman of his constitutional right to a jury trial was intelligent and competent in such a case as this.

Respondent was indicted under the mail fraud statute, 35 Stat. 1130, 18 U. S. C. § 338. It subjects to fine or imprisonment one who "having devised or intending to devise any scheme or artifice to defraud . . . shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement . . . in any post-office . . . or other letter box of the United States". It would be unlikely that a layman without the benefit of legal advice would understand the limited nature of the defenses available under that statute or the scope of the ultimate issues on which the question of guilt usually turns. Without that understanding I do not see how an intelligent choice between trial by judge or trial by jury could be made.

The broad sweep of the statute has not been restricted by judicial construction. What might appear to a layman as a complete defense has commonly been denied by the courts in keeping with the policy of Congress to draw tight the net around those who tax ingenuity in devising fraudulent schemes. Thus an indict-

ment will be upheld or a conviction sustained though the defendant did not intend to use the mails at the time the scheme was designed,[1] though no one was defrauded or suffered any loss,[2] though the defendant did not intend to receive[3] or did not receive[4] any benefit from the scheme, though the defendant actually believed that his plan would in the end benefit the persons solicited,[5] though the means were ineffective for carrying out the scheme,[6] and perhaps, even though the mails were used not for solicitation but only in collection of checks received pursuant to the plan.[7] In other words, the defenses in law are few and far between. As a practical matter, if the mails were employed at any stage, the question of guilt turns on whether the defendant had a fraudulent intent. That is the significant fact. *Durland* v. *United States*, 161 U. S. 306, 313.

I think a layman normally would need legal advice to know that much. And it seems to me unlikely that he would be capable of appraising his chances as between judge and jury without such advice. Without it he might well conclude that he had adequate defenses on which a judge could better pass than a jury. With such advice he might well pause to entrust the question of his intent to a particular judge, rather than to a jury of his peers drawn from the community where most of the transactions took place and instructed to acquit if they had a reasonable doubt. On the other hand if he had a full understanding of the issues, he might conceivably deem it a matter of large importance that he be tried by the judge rather than a jury. The point is that we should not leave to sheer speculation the question whether his waiver of a jury trial was intelligent and competent. Yet on this record we can only speculate, since all we know is that respondent professed to have "studied law" and that he lost a civil suit which he had prosecuted *pro se*. *McCann* v. *New York Stock Exchange*,

[1] United States v. Young, 232 U. S. 155.

[2] Cowl v. United States, 35 F. 2d 794; United States v. Rowe, 56 F. 2d 747.

[3] Kellogg v. United States, 126 Fed. 323.

[4] Calnay v. United States, 1 F. 2d 926; Chew v. United States, 9 F. 2d 348.

[5] Pandolfo v. United States, 286 Fed. 8; Foshay v. United States, 68 F. 2d 205.

[6] See Durland v. United States, 161 U. S. 306, 315.

[7] Tincher v. United States, 11 F 2d 18; Bradford v. United States, 129 F. 2d 274.

But see Dyhre v. Hudspeth, 106 F. 2d 286; Stapp v. United States, 120 F. 2d 898.

107 F. 2d 908. Furthermore, the right to trial by jury, like the right to have the assistance of counsel, is "too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Glasser* v. *United States*, 315 U. S. 60, 76. Moreover, as Judge Learned Hand stated in the court below, the answer to the question whether the waiver was intelligent should hardly be made to depend on "the outcome of a preliminary inquiry as to the competency" of the particular layman. If this constitutional right is to be jealously protected, there should be a reliable objective standard by which the trial court satisfies itself that the layman who waives trial by jury in a case like this has a full understanding of the consequences. *Dillingham* v. *United States*, 76 F. 2d 36, 39. At least where the trial judge fails to inform him the only safe and practical alternative in a case like the present one is to require the appointment of counsel. Only then should we say that the trial judge has exercised that "sound and advised discretion" which the *Patton* case required even before a waiver of one juror was accepted. 281 U. S. p. 312.

The question for us is not whether a judge should be trusted as much as a jury to determine the question of guilt. We are dealing here with one of the great historic civil liberties—the right to trial by jury. Article III, Sec. 2 and the Sixth Amendment which grant that right contain no exception, though a few have been implied. See *Ex parte Quirin*, 317 U. S. —. We should not permit the exceptions to be enlarged by waiver unless it is plain and beyond doubt that the waiver was freely and intelligently made. The *Patton* case surrounds such a waiver with numerous safeguards even where, as in that case, the waiver was made by one who was represented by counsel. We should be even more strict and exacting in case the waiver is made by a layman acting on his own. Then the reasons for indulging every reasonable presumption against a waiver of "fundamental constitutional rights" (*Johnson* v. *Zerbst*, 304 U. S. 458, 464) become even more compelling.

The fact that a defendant ordinarily may dispense with a trial by admitting his guilt is no reason for accepting this layman's waiver of a jury trial. What the Constitution requires is that the "trial" of a crime "shall be by jury". Art. III, Sec. 2. And it specifies the machinery which shall be employed if a plea of not guilty is entered and the prosecution is put to its proof. More-

over, we are not dealing here with absolutes. Normally admission of guilt could properly be accepted without more since ordinarily a defendant would know whether or not he was guilty of the crime charged. But there might conceivably be an exception, where, for example, the issue of guilt turned not only on the admitted facts but upon the construction of a statute. Each case of necessity turns on its own facts. Nor is it a sufficient answer to say that if legal advice is required for a waiver of trial by jury, then by the same token a layman representing himself could not exercise his own judgment concerning any matter during the trial with respect to which a lawyer might have superior knowledge. Whether the waiver of counsel for purposes of the trial meets the exacting standards of *Johnson* v. *Zerbst* is one thing. Whether that dilution of constitutional rights may be compounded by a waiver of trial by jury is quite another. It is the cumulative effect of the several waivers of constitutional rights in a given case which must be gauged. Nor can I accede to the suggestion of the prosecution that a layman's right to waive trial by jury is such an important part of his high privilege to manage his own case that its exercise should be freely accorded. That argument is faintly reminiscent of those notions of freedom of choice and liberty of contract which long denied protection to the individual in other fields.

Mr. Justice BLACK and Mr. Justice MURPHY join in this dissent.

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Mr. Justice MURPHY.

I join my brother DOUGLAS, but desire to add the following views in dissent.

The Constitution provides: "The Trial of all Crimes, . . . shall be by Jury; . . ." (Article III, § 2), and: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . ." (Amendment VI). Because of these provisions, the fundamental nature of jury trial,[1] and its beneficial effects as a means of leavening justice with the

[1] Compare Glasser v. United States, 315 U. S. 60, 84-85, and Jacob v. New York, 315 U. S. 752.

spirit of the times.[2] I do not concede that the right to a jury trial can be waived in criminal proceedings in the federal courts. Whatever may be the logic of the matter, there is a considerable practical difference between trial by eleven jurors, the situation in *Patton* v. *United States*, 281 U. S. 276, and trial to the court, and practicality is a sturdy guide to the preservation of Constitutional guaranties.

But if it is assumed that jury trial, the prized product of the travail of the past, can be waived by an accused, there should be compliance with rigorous standards, adequately designed to insure that an accused fully understands his rights and intelligently appreciates the effects of his step, before a court should accept such a waiver. Among those requirements in the case of a layman defendant in a criminal proceeding where the punishment may be substantial, as in the instant case, should be the right to have the benefit of the advice of counsel on the desirability of waiver. Of course the capacity of individuals to appraise their interests varies, but such a uniform general rule will protect the rights of all much better than a rule depending upon the fluctuating factual variables of the individual case which are often difficult to evaluate on the basis of the cold record. In my opinion the Constitution requires this general rule as an absolute right if a jury is to be waived at all.

A true copy.

Test:

*Clerk, Supreme Court, U. S.*

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[2] This is admirably stated by Judge Learned Hand below, 126 F. 2d at 775-776.